No. 84-634

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CHEVRON U.S.A., INC., et al.,
Petitioners

VS.

WILLIAM J. SHEFFIELD,
GOVERNOR OF THE STATE OF ALASKA, et al.,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONERS IN REPLY TO THE MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

RICHARD E. SHERWOOD*
CHARLES P. DIAMOND
400 South Hope Street,
Los Angeles, CA 90071
(213) 669-6000
Counsel for Petitioners

Of Counsel:
O'MELVENY & MYERS
STEVEN L. SMITH
400 South Hope Street
Los Angeles, CA 90071-2899

**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

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This memorandum is submitted in reply to the Solicitor General's memorandum expressing the views of the United States. Petitioners agree with the Solicitor General's opinion that the court of appeals incorrectly held that the deballasting prohibition of the Alaska Tanker Law is not preempted by federal regulations. However, for the reasons set forth below, Petitioners believe the Solicitor General is wrong in concluding that this case does not warrant review by this Court.

1. In the Solicitor General's memorandum, the United States remains faithful to the position it has maintained throughout this litigation that the deballasting prohibition contained in Alaska Stat. § 46.03.750(e)(Supp. 1977) is preempted by regulations promulgated by the Coast Guard pursuant to Title II of the Ports and Waterways Safety Act of 1972 (PWSA), 46 U.S.C. 391a, as amended by the Port and Tanker Safety Act of 1978 (PTSA), Pub. L. No. 95-474, 92 Stat. 1471 *et seq.* Accordingly, Petitioners agree with the Solicitor General's conclusion that the court of appeals incorrectly reversed the district court's decision that the Alaska statute was preempted by federal regulations (S.G. Memo. 1-5). More importantly, Petitioners concur in the Solicitor General's determination that the court of appeals' decision is at complete odds with the thrust of this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (S.G. Memo. 5).

This Court was called upon in *Ray* to consider Congress' purposes in enacting the PWSA, which mandates the comprehensive regulation of tanker design, construction and operation to control the problem of oil pollution from tankers within 50 miles of shore. Although the Court's decision specifically addressed standards for design and construction of tankers, the analysis adopted by the Court is equally applicable to the operating regulations promulgated by the Coast Guard pursuant to the PWSA. Recognizing the interrelationship among design, construction and operating standards in the context of oil pollution control efforts, Congress contemplated an integrated, uniform approach to regulation in this area. As the Solicitor General correctly points out, this Court in *Ray* acknowledged Congress' intention that implementing regulations adopt such a "systems" approach in setting standards to control oil pollution from tankers (S.G. Memo. 5). The court of appeals erred in undercutting *Ray* by excepting tanker

operations as an element of the comprehensive regulatory scheme deemed necessary by Congress (S.G. Memo. 5).

2. Although noting the court of appeals' failure to heed the unmistakable principles laid down in *Ray*, the United States questions the wisdom of further review of this case by suggesting that enforcement of the Alaska deballasting prohibition will not have the disruptive effect that petitioners fear (*see* S.G. Memo. 6; *but see* Pet. 7-8). In this regard, petitioners respectfully suggest that even in the event the Court deems plenary review impracticable, this case is a model candidate for summary reversal. Aside from its misreading of *Ray*, the only justification advanced by the court of appeals for upholding the Alaska law was the proposition that Alaska's prohibition, as a National Pollutant Discharge Elimination System (NPDES) limitation, has the force of federal law under the Clean Water Act, 33 U.S.C. § 1342. However, as the Solicitor General demonstrates (S.G. Memo. 5-6), the regulation of deballasting is excluded from the scope of the Clean Water Act by 40 C.F.R. 122.3(a), which specifically exempts from the scope of the permit system such discharges as deballasting incident to normal vessel operations.

3. As the Solicitor General would be constrained to agree, the only remaining question is whether the Alaska Tanker Law is somehow saved from preemption by section 311(b)(3) of the Clean Water Act on the theory that it incorporates into the federal standard for lawful discharges of oil any discharge in violation of an applicable state water quality standard. We disagree with the Solicitor General's view that this issue received insufficient attention from the courts below. It was the principal argument of the state defendants before the district court, and the claim was categorically rejected by a court convinced that "neither the Act nor the caselaw provide[s] founda-

tion for the state of Alaska's position that Alaska's challenged legislation is protected under the FWPCA (the forerunner of the CWA)"[1] (Pet. App. 51a). Nonetheless, to the extent this Court believes that this question deserves more extensive lower court review, the appropriate disposition is a summary remand to the court of appeals, not a denial of the instant petition.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

April 30, 1985

RICHARD E. SHERWOOD
CHARLES P. DIAMOND
Counsel for Petitioners

Of Counsel:
O'MELVENY & MYERS
STEVEN L. SMITH

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[1]The district court, as does the Solicitor General, noted that Section 311(b)(3) also provides that the determination of "harmful" discharges of oil must be consistent with "maritime safety and with marine and navigation laws and regulations" (S.G. Memo. 8; Pet. App. 47a).

[2]The Solicitor General suggested that this Court may lack jurisdiction to entertain this petition because petitioners filed the petition for rehearing by the court of appeals after the time for filing the petition for a writ of certiorari had expired. The petition for writ of certiorari nevertheless was timely. The court of appeals, by considering the petition for rehearing on its merits, placed the basis of its decision again in issue and thereby enlarged the time for review. *Pfister v. North Illinois Finance Corp.*, 317 U.S. 144, 149-150 (1942); *Bernard v. Johnson*, 314 U.S. 19, 31 (1941). Nothing in *Conboy v. First National Bank*, 203 U.S. 141, 145 (1906), the much earlier case cited by the Solicitor General, forecloses this result.